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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 487

NATIONAL DAIRY PRODUCTS CORPORATION, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

### OPINION BELOW, JURISDICTION, AND STATUTES INVOLVED

The opinions below, the basis for this Court's jurisdiction, and the statutes involved are adequately set forth in the petition (pp. 1–3) and appendix (pp. 101–110).

### QUESTIONS PRESENTED

1. Whether the Federal Trade Commission properly rejected petitioner's cost-justification defense to the charge that its quantity discounts given to members of cooperative or voluntary buying groups constituted illegal price discrimination in violation of the Robinson-Patman Act, where (1) the discounts were based on the average volume per store delivered

to the entire group, (2) the cost savings that purportedly justified the discounts depend on the quantity delivered to each particular store, (3) no savings in delivery costs resulted from a store's membership in the group and (4) the volume delivered to several stores in the group would have resulted in substantially smaller discounts for them, had they not been members of the group.

2. Whether the Finality Act of 1959 applies to orders entered by the Federal Trade Commission after the effective date of that Act in a case initiated before that date.

## STATEMENT

On December 31, 1957, the Federal Trade Commission issued a complaint (Pet. App. 80–90) charging that petitioner, the nation's largest distributor of dairy products, through its Sealtest Foods Division ("Sealtest"), had discriminated in price in selling milk and other dairy products, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a).[1] The hearing examiner sustained the complaint, rejecting petitioner's affirmative defenses of cost justification and good faith meeting of competition and, in July 1963, issued a cease-and-desist order (J.A. 171–172).[2]

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[1] The complaint also charged petitioner with granting discriminatory promotional allowances in violation of Section 2(d), 15 U.S.C. 13(d). The hearing examiner sustained that charge (Pet. App. 2 n. 1), and petitioner did not challenge that ruling before either the Commission or the court of appeals (Pet. 3 n. 3).

[2] "J.A." refers to the joint appendix in the court of appeals.

On petitioner's appeal, the Commission held that petitioner had violated the statute and entered a modified cease-and-desist order (Pet. App. 23–25).[3] On review, the court of appeals rejected petitioner's contention that certain price discriminations were cost justified,[4] and affirmed and enforced the Commission's order (Pet. App. 111).

The cost justification issue asserted in the petition arises from the method Sealtest has used in pricing milk products and ice cream sold to grocery chains in the areas of Toledo, Ohio, and Memphis, Tennessee (Pet. App. 26).[5] Sealtest's practices in the Toledo area are illustrative. In 1958 it had 292 customers in Toledo, Ohio, and nearby Monroe, Michigan. Some 270 of them were single-unit independent retail stores, and the remainder belonged to chains (corporate, voluntary and cooperative) or were stores under common ownership (Pet. App. 29). Because central warehousing of fluid milk products is not feasible, petitioner's deliveries were made directly to each member of the chains as well as to each of the independents (Pet. App. 10, 40). The larger the volume taken by a given location, the smaller was petitioner's cost of delivery per case (Pet. App. 10), but whether a store was an

[3] The Commission rejected the hearing examiner's conclusion that petitioner's price discriminations might cause injury to petitioner's own competitors but sustained his finding that there was a potential of injury among competing retail sellers of Sealtest products (Pet. App. 30–31).

[4] Contrary to the Commission, the court of appeals concluded that other price discriminations were made in good faith to meet competition (Pet. App. 6–10).

[5] Petitioner made no attempt to cost justify its discounts in the third area involved in this case, New Orleans, Louisiana,

independent or one of a chain did not affect the costs of serving that store (Pet. App. 13).[6]

In 1954, petitioner's Toledo plant instituted a monthly quantity discount schedule based upon a "point system." Each fluid milk product sold by the plant was assigned a point value.[7] Monthly rebates were granted, ranging from 2 to 12 per cent, depending on the number of points accumulated during the month (Pet. App. 27).

At all times a minimum of 700 points was required to qualify for a 2 per cent discount. Under the discount schedule in effect up to 1960, 40,000 points were required to qualify for the maximum rebate (Pet. App. 28). In that year a new schedule was adopted that generally reduced the number of points required for discounts above 5 percent; a monthly volume of 10,000 points became the requirement for the 12 percent rate (Pet. App. 28–29).

At all times the rebate earned by each independent store was determined by the points that store accumulated during the month. Up to 1960, the rebate to chain customers was computed by aggregating the points of all stores in the chain.[8] Then petitioner changed to an "averaging" method. The total points of all stores in the chain were divided by the number of stores. The resulting average determined the rebate

[6] Delivery costs represented 70 percent of total distribution costs (J.A. 646).

[7] Points ranged from one for each quart of milk or buttermilk to eight for each quart of whipping cream (Pet. App. 28).

[8] Petitioner has not attempted to cost justify the aggregating practice (Pet. App. 14–15).

on the chain's total monthly purchases (Pet App. 37–39).

In July 1958, when petitioner's cost studies were conducted (Pet. App. 29, 33), 158 of petitioner's independent store customers in the Toledo area were receiving no rebate, while 112 were receiving rebates of 2 percent to 6 percent. Thirteen of the chains were receiving 12 percent, eight 10 percent, and one 7 percent (Pet. App. 3).

Petitioner sought to justify the discounts to eight of its customers in Toledo on the ground that the differing prices were justified by differing costs of sales. With exceptions not pertinent here,[9] six of the eight would have received the same 12 percent discount whether the rebate was calculated on a store-by-store basis or by petitioner's averaging method (Pet. App. 10–11). The Commission ruled that the discounts given the other two—the Saveway and Red & White stores—were not cost justified (Pet. App. 11). The two were "voluntary and cooperative groups" or "chains" (Pet. App. 29, 37 n. 3). The record shows that both the Red & White and the Saveway stores were "individually owned," that it was "the individual stores [who] are buying the milk" and that "the

[9] One store of one chain took a volume midway between the 11 and 12 percent bracket and one store of another chain had a monthly volume that would have justified only a 9 percent discount. The court of appeals (Pet. App. 8–11 n. 4) considered the former difference de minimis and the second a borderline situation as to which "any injurious effect of the discount would seem * * * remote." Commission counsel did not, in the court of appeals, contend that the use of the averaging method in these two situations was unlawful (see *id.* 15).

billing comes through the individual stores" (J.A. 926), but that petitioner sent the rebate checks to the group headquarters (J.A. 743).

Although the Commission concluded that petitioner's Toledo discount schedule was cost justified to the extent that it was applied on a location-by-location basis, because the cost studies showed that the unit costs of distributing to a store decreased with increasing volume and that the decrease at least equaled the resulting discount, it decided (Pet. App. 39–40) "that discounts to multi-unit purchasers must be cost justified on a store-by-store basis" rather than by petitioner's averaging method. Finding that (Pet. App. 40) "the averaging of purchases has no relationship to the costs actually incurred in dealing with each store," the Commission observed that the largest independent store in the area was receiving a 6 percent discount, while "a competing chain store unit of the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership in the chain", even though "mere membership" in a chain "does not lessen the cost of dealing with a store." The Commission concluded that petitioner's costing procedure did not accurately reflect the differences in the expenses of delivery to the independent stores and to the groups because, although it measured discounts to smaller chain members by savings realized in making delivery to the larger units, the method was (Pet. App. 41) "not related to the realities of the market" that "[a]n independent store competes in the sale of Sealtest milk with the individual stores of a chain" and would

therefore defeat the statutory purpose of curbing (*id.* at 40) "excessive concessions secured by chain buyers in competition with independent stores."

The Commission similarly rejected the attempted cost justification of rebates on average deliveries to the members of the two Memphis chains whose discounts were calculated by such a method (Pet. App. 52–58). But the Memphis defense was also found invalid on alternative grounds. As to one group, the Malone & Hyde stores, a voluntary buying group (Pet. App. 52–54), the Commission, relying on *United States* v. *Borden Co.*, 370 U.S. 460, ruled that the grant of the highest discount could not be based on a computation that averaged the cost of servicing Malone & Hyde stores and independents because the record demonstrated "that there were independent stores in respondent's 5 cent bracket which had volume purchases larger than the average of the Malone & Hyde stores" (Pet. App. 58). As to the other Memphis chain, Food Center, (a corporate chain with six stores, Pet. App. 56), the Commission found that the cost data failed to justify a 7-cent off-schedule discount. The record showed (*id.* 59) it cost National $.3840 per gallon to distribute ice cream to Food Center stores, whereas its cost of distribution to customers in the 5-cent bracket was $.3869, a cost difference of only $.0029 which (*ibid.*) "cannot justify a 2 cents per gallon difference in price."

The court of appeals affirmed and enforced the Commission's order (*id.* at 22). Because (*id.* 13). "[t]he cost of selling a given volume of milk to one store" is the same for chains and independents, the court concluded that "when the group or chain re-

ceives a greater discount than the independent, the seller is bowing to the size of the buyer and not making 'due allowance' for cost savings."

ARGUMENT

1. Petitioner presents the question whether "a seller's discount to a retail food chain may not be cost justified on the basis of the seller's cost of serving such a chain as a single 'purchaser,' but instead must be cost justified as if each store unit receiving deliveries were a separate purchaser" (Pet. 2; see Pet. 7); and it states (Pet. 10) that the decisions below "disregard the business reality * * * that a seller's cost of serving a chain is for all practical purposes its over-all cost of selling and delivering to the chain *as a business unit*" (emphasis in original). This broad question, however, is not presented as the case comes to this Court. The price discriminations as to which this issue of cost justification remains do not involve a "chain" in the sense of a group of stores operated as a single business entity under common control and management. Because there was no attempt to cost-justify the New Orleans discounts, and because the Commission rejected the Memphis cost defense on alternative grounds, petitioner's claim of cost justification here involves only the rebates given to cooperative or voluntary buying groups, some of whose members would have received lesser discounts through the application of petitioner's discount schedule on a location-by-location basis. These groups are the Red & White stores and the Saveway stores in Toledo, each of which was comprised of independent stores that

combined for purposes of joint purchasing and other activities, with each store retaining its fundamental characteristic as a separate business entity.[10]

(a) The Commission correctly rejected petitioner's attempt to cost justify its off-schedule discounts to these groups, on the basis of the average costs of serving the members of the group, and properly held (Pet. App. 39–40) that "discounts to [such] multi-unit purchasers must be cost justified on a store-by-store basis." Section 2(a) of the Robinson-Patman Act permits otherwise illegal price differentials "which make only due allowance for differences in the cost of * * * delivery resulting from the differing * * * quantities in which such commodities are to such purchasers * * * delivered." Petitioner delivers its products separately to each outlet in these groups; the unit cost of delivery varies with and is directly related to the volume of each delivery to each location; and it is these variations in delivery costs that petitioner relies upon to support its claim that the differentials are cost justified. But the cost of delivery is the same whether the particular location served is an independent store or a member of a cooperative buying group. The critical question is whether the lower price given to the latter outlet reflects the "differences in the cost of * * * delivery resulting from the differing * * * quantities in which" the product is delivered. In other words, the price dif-

[10] We have set forth in an appendix the facts relating to these groups and the two Memphis groups, as to which the Commission found the cost study also defective for other reasons.

ferential must be directly measured by the savings resulting from the differences in quantities delivered. Cf. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68.

Petitioner's cost calculation, based on the average cost of serving all the stores in the group, does not accurately reflect the differences in savings resulting from the different volumes delivered to the different outlets. To permit cost justification on this basis would be contrary to the basic purpose of the Robinson-Patman Act "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168). As separate entities, each member of the cooperative group presumably sets its own retail prices independently; any special discount that these stores receive would injure the competing independent stores that did not enjoy such benefits. Moreover, petitioner's averaging method could well result in a large independent receiving a lesser discount than a smaller member of the cooperative group, a result that would contravene the fundamental design of the Robinson-Patman Act. Cf. *United States* v. *Borden Co.*, 370 U.S. 460. Thus, the discounts given to the cooperative groups that pooled the purchasing power of the individual stores did not even-handedly reflect the "physical economies that are to be found in mass buying and distribution," which were the discounts that Congress intended to allow under the cost justification defense. H. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936); see S. Rep. No.

1502, 74th Cong., 2d Sess. 5 (1936). This case is therefore indistinguishable in principle from those on which the Seventh Circuit relied here (Pet. App. 12–13), where the courts of appeals uniformly have refused to approve discounts based on group buying, if, as here, the fact of group buying does not lessen the seller's cost.[11]

(b) Petitioner apparently contends (Pet. 8) that it can treat all members of the buying group as a single "purchaser" for cost justification purposes merely because the common agent of the group negotiated the terms and the conditions of the sale for all the members, and that it is immaterial "where or how the buyer takes delivery." But the record shows that each store in the group was the actual buyer, even though the rebate was paid to the group headquarters (*supra,* pp. 5–6). Moreover, only last Term this Court rejected a similarly artificial reading of the word "customer" in Section 2(d) of the Robinson-Patman Act as "wholly untenable when viewed in light of the central purpose of § 2(d) and the economic realities with which its framers were concerned". (*Fed-*

[11] Petitioner's contention (Pet. 2) that the Commission held that a valid cost justification defense may be rejected solely because its acceptance would injure competition is based on a misreading of the decisions below. Petitioner's cost justification defense was rejected because petitioner's price discriminations were found not to reflect only "due allowance" for differences in costs of delivery (see Pet. App. 13, 40–41). Indeed, in sanctioning petitioner's discount schedule to the extent that it was applied on a location-by-location basis, the Commission expressly permits petitioner to grant substantially different discounts to different customers, despite any competitive harm occasioned thereby, because such discounts were cost justified.

*eral Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349). In the present case, as we have shown, the "central purpose" of the cost justification defense was to permit only those price discriminations that reflect savings in distribution costs, and the "economic realities" are that the costs of delivery said to justify the discounts vary with the quantity delivered to each location. The Commission therefore properly required petitioner to justify the discounts on the only basis that actually reflects whatever costs savings result from serving members of the group as compared to the independents: the difference in costs of delivery to the different locations. Indeed, even if the buying group itself were treated as a single purchaser, the Commission still was warranted in requiring petitioner to cost justify on a store-to-store basis, since it was the difference in the expenses of serving different members of the group that reflects the "differences in the cost of * * * delivery resulting from the differing * * * quantities in which such commodities are to such purchasers * * * delivered."

This interpretation of the statute would not, as petitioner argues (Pet. 10), preclude it from passing on to its customers any savings in actual distribution costs. Petitioner could, and may, revise its discount schedules to permit any discount—even greater than the 12 percent maximum it now has—that it can justify on the basis of its delivery costs to a particular outlet.

(c) Contrary to petitioner's contention (Pet. 13–17), the decision below is neither inconsistent with *United States* v. *Borden Co.*, *supra*, nor in conflict

with *American Motors Corp.* v. *Federal Trade Commission*, 384 F. 2d 247 (C.A. 6), certiorari denied, 390 U.S. 1012.

The question in *Borden* was whether a cost defense was invalid because it was based on a comparison of a dairy's average cost of serving all grocery chain customers with its average cost of serving all independent stores, even though there was a broad disparity in the volume of delivery and the provision of services among the separate members of each class. Although this Court held that the discounts need not be separately cost justified with respect to each customer, 370 U.S. at 468, it ruled that averaging techniques may be used to determine costs only if a seller's segregation of his customers into discount classes is based on factors having a rational bearing on the cost of servicing the customers within each class. The *Borden* study was held defective because, by comparing the average cost of servicing all chain stores with that of servicing all independents, the large independents were denied discounts available to chain stores of the same or smaller size, even though the costs of selling to those independents would be no more than in the case of the chain stores.

Here petitioner has been allowed to use averaging methods to the extent that *Borden* holds them proper, *i.e.*, the Commission accepted petitioner's use of the average cost of servicing each location taking essentially the same volume of dairy products. Nothing in *Borden*, however, sanctions petitioner's discount systems under which particular members of a cooperative or voluntary buying group could receive larger dis-

counts than independent stores which take the same delivery volume and which it costs petitioner no more to serve.

In *American Motors*, the court of appeals, reversing the Commission, sustained a cost-justification defense in which the company compared the cost of servicing four "merchandise distributors" with the average cost of servicing 6,000 other purchasers. There was no suggestion of variations in the cost of servicing the various outlets of each merchandise distributor. Rather, the question was whether American Motors properly had combined and averaged the cost of servicing the other 6,000 customers, since not all of those customers required the services that American Motors said were the justification for the higher prices charged. Petitioner, however, never sought to treat its independent customers as a single class receiving the same discount.[12]

2. The court of appeals correctly applied the Finality Act of 1959 to this case and, as that Act requires, enforced the Commission order upon affirming it.

Prior to that Act, a court of appeals could only affirm a Commission cease-and-desist order under the Clayton Act; the Commission could obtain enforcement only by showing a subsequent violation. See

[12] Petitioner also relies on *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 59 (C.A. 8). But the very quotation petitioner cites merely approved a cost defense based upon the combined cost of serving different plants "where * * * operated by a single entity"; as we have shown that is not the situation here. Moreover, in the light of this Court's subsequent decision in *Borden*, it is by no means clear that the Eighth Circuit would follow its *Russellville* decision if the issue again came before it.

*Federal Trade Commission* v. *Jantzen*, 386 U.S. 228, 231. "[T]o strengthen the hand of the Commission in the enforcement of the Clayton Act" (*id.* at 230), the Finalty Act provides that courts of appeals in review proceedings shall enforce such orders upon affirming them.

Section 2 of that Act provides that it shall not apply "to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11" of the Clayton Act, and that "each such proceeding" shall be governed by the former provisions of Section 11. The third and fourth paragraphs of Section 11 deal with petitions to review and to enforce Commission orders; they do not in terms apply to the administrative proceeding itself, which is the only thing in this case that was "initiated" before the Finalty Act.

In *Jantzen*, this Court held that orders entered prior to the effective date of the Finalty Act could be enforced under the old Clayton Act procedure, rejecting the view that the effect of the Finalty Act was to make such orders unenforceable. In so ruling, the Court stated (386 U.S. at 233) that in Section 2 of the Finalty Act "the word 'proceeding' was used [as meaning] the action brought by the Commission against the alleged violator of the Clayton Act." Reading this quotation literally but out of context, petitioner contends that since "the action brought by the Commission" against it was begun prior to 1959, Section 2 required the court of appeals to follow the pre-1959 review procedure, and that the court therefore should have affirmed the order, but not enforced it.

Petitioner's argument rests upon a misreading of the *Jantzen* decision. *Jantzen* had nothing to do with

the procedure for enforcing orders entered after the effective date of the Finality Act; the sole issue there involved orders entered before that date. All this Court held in *Jantzen* was that the words "proceeding initiated" covered "the filing of the 'proceeding' before the Commission *and was not limited* to the application for enforcement or petition for review" (386 U.S. at 233, emphasis added). It pointed out (*id.* p. 233–234) that in the Finalty Act Congress "wished to make clear that not only applications for enforcement of pre-Finalty Act orders and petitions for review of such orders but any action of the Commission with reference to pre-Finalty Act orders would be governed by the [old] provisions of § 11 of the Clayton Act * * *."

There is nothing in either the Finalty Act itself or the *Jantzen* decision indicating that Congress did not intend the Act to apply to all orders entered after its effective date, no matter when the administrative proceeding had begun. Indeed, it would be wholly inconsistent with the congressional purpose of strengthening Clayton Act enforcement to require the Commission to follow the old archaic procedure to obtain enforcement of an order entered seven years after the Finalty Act became law.[13]

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[13] In several contested cases in which the issue was not raised, Commission Clayton Act orders entered after enactment of the Finalty Act have been affirmed and enforced even though the administrative proceedings were begun before the Finalty Act became law. See, *e.g.*, *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351 (C.A. 9), certiorari denied, 386 U.S. 908; *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (C.A. 9), reversed on another issue, 389 U.S. 179; *Mytinger & Casselberry* v. *Federal Trade Commission*, 301 F. 2d 534 (C.A.D.C.).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1968.

# APPENDIX

## Facts Relating to the Four Multiple-Outlet Purchasers as to Which the Court of Appeals Upheld the Commission's Rejection of Petitioner's Cost Justification Defense Because Based Upon the Average Cost of Serving All the Outlets in the Group, Rather Than the Individual Cost of Serving Each Outlet

The Commission found (Pet. App. 35, 57–58) that petitioner had cost justified its regular discount schedules in both Toledo and Memphis, and the only remaining issue concerns the attempted justification of petitioner's application of its quantity-discount schedules to the average deliveries to members of the four groups.

1. *Toledo.* In Toledo, as the court of appeals pointed out (Pet. App. 10), petitioner relied on the cost justification defense "with respect to 8 of its 22 customers receiving discriminatory discounts." The court held (*id.*, 10–11) that the averaging "would be permissible for National with respect to six of its corporate chain customers," because the discounts they received under the average calculation were no greater than they would have received were the cost of serving each store determined individually (see, also, *id.*, p. 15). The court then stated (*id.*, p. 11): "However, in the case of the Red & White Stores and the Saveway Stores, the averaging method would not be justified in granting a 12% discount to each member store because various of them individually purchased enough milk only to qualify for a much smaller per-

centage discount, such as received by most of National's independent store customers."

Petitioner's own exhibit listed Red & White and Saveway as "Voluntary and Cooperative Groups" (as distinguished from another group described as "Corporate Chains") (Respondent's Ex. 127A, Respondent's Exhs. in the court of appeals, Volume II, p. 392); the Commission found that both Red & White and Saveway were "voluntary and cooperative groups [or] chains" (Pet. App., pp. 29, 37, n. 3); petitioner's brief in the court of appeals similarly described them as "voluntary groups" (again as distinguished from "corporate chains") (Petitioner's brief, p. 10); and the court of appeals so viewed them (Pet. App. 11). Petitioner now states (Pet., p. 5, n. 5), however, that Saveway "own[ed] stores." Although originally Saveway was a corporate chain of 14 stores owned by a single individual, since 1946 it had been joined by several individual stores in a group-buying operation (J.A. 916–917). The Commission found (Pet. App. 51 n. 9) that the Saveway "corporate chain [was] disbanded in 1958 and the stores became members of the Red & White voluntary group." The former owner of the Saveway corporate chain testified at the hearings in 1960 (J.A. 926) that "[t]he Saveway stores are individually owned, too, the same as the Red & White"; he also testified (*ibid.*) that in the Red & White group it was "the individual stores [who] are buying the milk," and that "the billing comes through the individual stores."

2. *Memphis.* Petitioner sought to justify its off-schedule discounts only with respect to two customers in Memphis (Pet. App. 58): The Malone & Hyde stores, a cooperative buying and warehousing organization (*id.* 52–54); and Food Center, "a corporate chain with six stores" (*id.*, 56). In the case of Malone

& Hyde the Commission, rejecting the contention that this firm was a wholesaler who purchased for all members of the group (Pet. App. 53), found that petitioner's sales "were made to the member stores of the Malone & Hyde organization and that these stores performed no function different from that performed by their competitors who purchased respondent's ice cream" (Pet. App. 55)—a finding the court of appeals sustained (Pet. App. 17–18).

Although the Commission held impermissible, for the reasons given in its discussion of the Toledo cost justification defense (see the Statement, supra, p. 6), petitioner's use of averaging costs in serving these two groups of stores (*id.*, 58), it further ruled (*ibid.*) that "the cost justification defense is invalid as to both of these groups for other reasons," which it detailed, see p. 7, *supra*.

In discussing the Memphis discriminations, petitioner's main brief in the court of appeals focused almost entirely upon the Malone & Hyde stores, and made only passing references to Food Center (pp. 14–15, 85–87); its reply brief similarly shows that the major cost justification issue in Memphis related to Malone & Hyde (reply brief, pp. 29–32). The court of appeals' detailed discussion of the Memphis cost justification dealt solely with the Malone & Hyde stores (Pet. App. 17–18).

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